

Congress' intention is apparent when comparing § 224(d) to statutes which order a single specific rate. Where a statute requires charges to be assessed only pursuant to a filed tariff, the "filed rate doctrine" controls. The "filed rate doctrine" holds that:

[T]he rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging *either less or more* than the rate filed. The rule is undeniably strict and it may obviously work hardship in some cases, but it embodies the policy that has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.²²

Thus, when a tariff is specified in a statute involving common carriage, as in the case of motor carriers or phone companies, only the filed or tariff rate may be charged -- nothing greater and nothing less.²³ Even though the relevant agency may "know better" than Congress regarding the specifics of the regulated industry, it may not adopt a policy at odds with the requirement that a tariff be filed and only that rate be charged. As the Court stated in *Maislin Indus.*:

Although the Commission has both the authority and expertise generally to adopt new policy when faced with new developments in the industry, it does not have the power to adopt a policy that conflicts directly with its governing statute.²⁴

22. *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990) (quoting *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)) (applying Interstate Commerce Act, 49 U.S.C. § 1 et seq.).

23. *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 128 (1990) ("The filed rate doctrine, therefore, follows from the requirement that only filed rates be collected[.]"); *id.* at 130 (only one rate, the tariffed rate, may be charged where a statute "has provided for the establishing of *one rate*, to be filed as provided, subject to change as provided, and that rate to be while in force the *only* legal rate.") (quoting *Armour Packing Co. v. U.S.*, 209 U.S. 56, 81 (1908)) (emphasis added).

24. 497 U.S. 116, 134-35 (1990) (citation omitted).

Supreme Court precedent instructs that the filed rate doctrine is just as applicable to federal regulation of communications as it was to the regulation of interstate commerce.²⁵ As such, the Commission is more than passingly familiar with the intricacies of statutorily required tariffs. Its power to modify the filed tariff provisions of the Communications Act is modest at best.²⁶

The pole attachment provisions of the Communications Act present the other side of the tariffing coin. Where the Act requires the filing of tariffs, as in Section 203,²⁷ one and only one rate may be charged; conversely, where the Act specifies that a range of rates may be negotiated and charged, with the Commission serving only in the role of referee of disputes about maximum actual fully allocated costs, as in Section 224(d), the Commission may not adopt the equivalent of tariff-type regulation. Comparing and contrasting the tariff provisions of the Act with its provisions regarding pole attachment rates demonstrates that a mechanical, one-size-fits-all, Commission-mandated formula rate does not comport with the intent of Section 224.

25. *MCI Telecommunications Corp. v. AT&T*, 114 S.Ct. 2223, 2231 (1994) ("The tariff-filing requirement is . . . the heart of the common carrier section of the Communications Act[, just as it was] of the Interstate Commerce Act, which served as its model."); *see also id.* at 2232 ("Rate filings are, in fact, the essential characteristic of a rate-regulated industry.") (*citing Maislin Indus.*, 497 U.S. 116, 132 (1990)); *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1522 (D.C. Cir. 1995) (noting that "the Communications Act and the Interstate Commerce Act share a common ancestor, the original Interstate Commerce Act").

26. *See generally Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1519, 1526 (D.C. Cir. 1995); *id.* at 1517 ("Congress granted the Commission very modest modification authority under Section 203(b)") (*citing MCI Telecommunications Corp. v. AT&T*, 114 S.Ct. 223 (1994)).

27. 47 U.S.C. § 203.

Section 203 of the Act requires that carriers file tariffs disclosing their rate(s) with the Commission, then charge only the filed rate and no other rate.²⁸ By contrast, Section 224 requires the Commission to ensure that the charges for attachment to utility poles are "just and reasonable." Section 224 defines "just and reasonable" rates as those that permit:

a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1). Where Section 203 contemplates that one and only one previously specified rate be charged, Section 224 permits a wide range of rates determined by the facts associated with specific utility properties and the accounting and engineering conventions employed by the utility. If the Commission were to assign maximum just and reasonable status to a universal formula rate applicable without change to all utilities, the Commission would collapse the *range* of statutorily permissible rates to the point where it becomes one rate -- essentially a tariff. Such one-rate, tariff-like regulation, while mandated by some portions of the statute, is clearly *not* what Congress contemplated either when it adopted or when it later amended Section 224.

Courts have held that the Commission may not even modify the statute's tariff requirements so much as to permit a range of permissible rates.²⁹ Conversely, the

28. *MCI Telecommunications Corp. v. AT&T*, 114 S.Ct. 2223, 2226 (1994); *id.* at 2228 (citing 47 U.S.C. § 203 (1988 ed. and Supp. IV)).

29. *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995) (citing *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)).

Commission is not authorized to modify the statute's authorization of a broad range of reasonable rates to require instead a single, *de facto* tariff rate.³⁰ The Commission should not, therefore, require strict adherence to a single formula³¹ and effectively bar the introduction of evidence suggesting that a rate other than the formula rate complies with the statute.

4. Necessity and Right to Negotiate Terms and Conditions

In this proceeding, the Commission should expressly reaffirm that pole owners and attaching telecommunications providers or entities are free to negotiate reasonable terms and conditions of attachment. Neither the Pole Attachment Act in 1978 nor the amendments thereto included in the Telecommunications Act of 1996 were intended to remove pole attachments from the sphere of negotiated agreements. The underlying intent of the pole attachment provisions of the Communications Act has always been that parties should negotiate reasonable rates, terms and conditions of attachment and that the Commission should not involve itself unless engaged by one of the parties to review a particular negotiated term or condition. If reasonable negotiated terms and conditions are not respected

30. See *id.* at 1521-22 (comparing Section 203 requiring filing and adherence to tariffs to Section 205 permitting establishment of ranges of rates and indicating that Congress knows how to specify the use of a range of rates rather than a single rate).

31. Indeed, the Commission has from the onset resisted such regulation. When a 1978 pole attachment commenter suggested that utilities be permitted to file proposed rates with the Commission for approval, the Commission rejected the suggestion, stating, "[w]e believe that such a procedure . . . would lead to the kind of tariff regulatory proceeding sought to be avoided by Congress [when it adopted the Pole Attachment Act]." *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, First Report and Order, 68 FCC.2d 1585, 1590 (1978). Nothing has occurred that should lead the Commission to change its position on this matter.

(and enforced) by the FCC, the negotiation process will become a sham. Utilities and attachers will have little incentive to negotiate if the fruits of their efforts can be rendered nugatory by resort to a tariff-like formula established and rigidly implemented by Commission rules.

Congress, in adopting the Pole Attachment Act, and in later amending it, has evinced an intent that pole attachment terms and conditions remain primarily within the control of the negotiating parties. When originally enacting the pole attachment provisions, Congress clearly stated:

The underlying concept of [the Pole Attachment Act] is to assure that the communications space on utility poles, *created as a result of private agreement between [utilities and attachers]*, be made available . . . under just and reasonable terms and conditions[.]³²

In the intervening twenty years, as pole attachment regulation and litigation has evolved, and as the cable industry has matured, the basic notion of negotiated agreements underlying the Communications Act's pole attachment provisions has not changed. In amending Section 224 of the Act, Congress explicitly stated that "the Commission shall . . . allow for reasonable terms and conditions relating to health, safety, and the provision of reliable utility service."³³ The Conference Agreement amending Section 224 even took the

32. S. Rep. No. 95-580, 95th Cong., 1st Sess. 22, *reprinted in* 1978 U.S.C.C.A.N. 109, 123 (emphasis added); *see also id.* ("The basic design of [the Act] is to empower the [Commission] to exercise regulatory oversight over the arrangements between utilities and [attachers] . . . where *the parties themselves are unable to reach a mutually satisfactory arrangement[.]*") (emphasis added). Congress stated quite bluntly that "[t]he Commission is not empowered to prescribe . . . terms and conditions for . . . pole attachments generally." *Id.*

33. House Conf. Rep. No. 104-458, 104th Cong., 2nd Sess. 206, *reprinted in* 1996 U.S.C.C.A.N. at 121; *see also* 142 Cong. Rec. H1078, H1134 (same text).

step of specifically allowing "parties to negotiate the rates, terms and conditions for attaching to poles, ducts, conduits, and rights-of-way owned or controlled by utilities." ³⁴ Given this clear, long-standing and recently reaffirmed intent favoring *negotiation* of terms and conditions, the Commission must respect and give force to the reasonable terms and conditions negotiated in pole attachment agreements. *See infra*. It would be contrary to the intent of the Act to enforce a one-size-fits-all mechanical formula applicable to all utilities without providing an opportunity to, given the context, rebut the presumption that the formula was correct as applied. Accordingly, in adopting any formula, the Commission should permit utilities, based upon factual support, to depart from the formula in calculating fully allocated costs.

5. Nondiscrimination

The Commission should also expressly recognize that the rates, terms and conditions of the pole attachment agreements between a utility and various cable operator need not be identical. There is a range of acceptable rates a utility may charge for pole attachments. Section 224 acknowledges and sanctions establishment of ranges of rates. In addition, as indicated directly above, Congress intended utilities and attachers to freely negotiate the terms of each pole attachment agreement. The underlying purposes of the statute cannot be met unless utilities may enter into pole attachment agreements that include marginally different terms satisfying each attacher's unique needs.

The first reason for such leeway is a practical one. All of a utility's pole attachment agreements are not likely to be negotiated or executed within the same time frame. If the

34. *Id.* at 221.

Commission does not permit the terms of a utility's pole attachment agreements to vary somewhat, the utility will be locked into every single term of its first agreement *ad infinitum*, and the utility -- and subsequent attachers -- would be denied the statutorily intended opportunity to engage in arm's length negotiations. Such a denial may be particularly crucial to subsequent attachers, as each attaching entity's needs and priorities may not be identical.

The other imperative underlying the freedom to negotiate the terms and conditions of each pole attachment agreement arises in the context of the non-discrimination provisions of Section 224. The Commission should not allow attaching entities to pursue charges of discrimination over immaterial or slight variations among terms of attachment.³⁵

Discrimination requires either an intent on the part of the utility to injure an attaching entity or to unreasonably benefit the utility as a result of the alleged discrimination. By recognizing that the terms of a utility's pole attachment agreements may differ within a range of reason, the Commission can head off claims of discrimination which do not manifest the *unreasonable* discrimination barred by Section 224.

6. Accounting Systems Limitations

The Electric Utilities believe that only sophisticated and expensive new accounting systems could permit the electric utilities to begin to capture in a uniform manner all of the additional costs associated with pole attachments. In reality, the Electric Utilities realize that attachers are not interested in paying the additional costs necessary to develop and install such systems. Regardless, even if the utilities were willing to invest in accounting systems

35. It is important for the Commission to clarify that "non-discrimination" in access does not require that all attachers obtain the same rate or the same terms and conditions. Otherwise, negotiation is futile, and the Commission will be inundated with complaints.

that would track the costs of pole attachments in more detail, there is no assurance that even the most sophisticated systems could begin to capture all of the costs and fully reimburse the Electric Utilities for the costs of attachments as required by the statute and the constitution.

Many costs are not currently captured by the accounting systems in use by the Electric Utilities. Among the costs that are not uniformly captured are the costs associated with administration of Joint Use Agreements, including salaries and office expenses, the costs of periodic in house meetings with groups of attachers, and many other costs which cannot be directly billed, or accommodated in any formulae.³⁶

Consistent with these observations, the Electric Utilities request that the Commission expressly recognize that any formula will only be, at best, a rough estimate of costs, and that many costs may not be captured by the formula for a particular utility. As a consequence, the Electric Utilities request that the formula rate derived for any electric utility be only presumptively applicable, at the same time acknowledging that if a complaint were filed, the utility would have the burden of proving additional costs it sought to recover outside the formula.

7. Conclusion

To achieve just and reasonable rates, the Commission should allow negotiated rates which enable parties to resolve unique pricing problems by agreement, including departures from the formula. The just and reasonable standard also precludes non-rebuttable, firm, fixed prices, generally applicable to all utilities. Just and reasonable prices cannot be set by

36. A partial list of such costs is provided at Appendix B attached hereto. While all of these costs are located in some FERC account, allocating them is difficult, and they would not be uniformly treated among the utilities.

any formula without violating Congress' intent to allow recovery of fully allocated costs. At the same time, a formula can help the parties arrive at a negotiated rate and provide some sense of what the likely range of a just and reasonable price might be for a given utility. Specific suggestions for improving upon the presumptively applicable formula follow.

IV. SPECIFIC PRESUMPTIONS APPLIED TO POLE ATTACHMENT FORMULA CALCULATIONS

The Whitepaper referred to in the NPRM suggested specific changes to the pole attachment rate calculation formula based on assumptions about pole sizes and usage. In response, the Commission invited comment on its presumptions regarding the physical characteristics of poles. NPRM at ¶ 18. The presumptions specify that the average pole height is 37.5 feet, average usable space per pole is 13.5 feet, and average unusable space per pole is 24 feet.

The Electric Utilities assert that these assumptions and figures are, for a number of reasons, no longer accurate. Since the time the Commission adopted its initial presumptions, more attachers have requested space on poles, and improvements have been made regarding the ability to add more attachers to poles. Due primarily to the increase in the number of attachers, taller and stronger class³⁷ poles have also had to be added to the installed pole base. These poles, designed to accommodate additional attachments, have significantly different costs and have widely different space availabilities. Finally, experience has

37. "Class" of pole refers to the diameter of the pole, which is related to its strength. Larger diameter poles are required to support the increased loads added by cable and other communications attachments. This adds to the cost in much the same way that need to use taller poles arising from multiple attachments increases the cost.

provided the Electric Utilities with a significant amount of empirical data not previously available that is directly relevant to the proper development of a pole attachment rate or formula. For these and other reasons outlined below, the calculations and assumptions used in the past are no longer consistent with electric utility practice and are in need of readjustment in this rule making.

A. Average Pole Height and Class; Application to Formula Development

Poles are generally classified by two measures -- height and class. Pole heights range generally from twenty feet (20') to over sixty feet (60'). Pole height is not the only measure which determines of the number of attachments which may be placed on a pole. Poles are also classified by class, which is primarily a determinant of diameter, and torsion strength. The other two primary factors which determine the maximum number of attachments which may theoretically be placed on a pole are the type of attachments being placed and the basic construction material of the pole. For purposes of this part of the discussion, we are limiting our analysis to the primary features of height and class.

The amount of usable space available and the amount of space typically occupied by attachers will vary based on the height and class of poles and the configuration of the attacher's facilities. It is possible to generally classify poles into two broad categories for analysis and classification due to usage, usable space and calculation assumptions. In addition, as alluded to above, due to the accounting records generally kept by electric

utilities, general classification of poles into two types can be accomplished, while further subclassification into additional groups may be impossible at this time.³⁸

Poles thirty feet (30') and under are generally used by electric utilities only as service drop and outdoor lightning poles. These poles are typically smaller in diameter, generally class six (6) or seven (7) poles, and cannot support primary electrical conductors and multiple communications wires. As indicated, these poles are typically used for service drops to homes, street lighting, outdoor lighting and span guy support. Thirty-foot (30') poles normally can support up to three companies' service drop attachments.³⁹ Attached as Exhibit 1 are photographs of typical thirty foot pole configurations demonstrating the type, number and spacing of attachments.

Thirty foot poles generally do not have the diameter, strength or space to carry anything other than drop attachments consisting of electric utility service wires and communications companies' service drops. These poles are not used as mainline poles, and generally are not used for the attachment of primary or higher voltage electric service transmission wires.

As a consequence of the vast differences in the use and capacities of these different types of poles, the electric utilities recommend the use of two separate formulas, one for poles of thirty feet and under, and one for all poles over thirty feet. Many of the Electric

38. Where accounting data does not permit direct separation of information by pole height, the Commission should allow electric utilities to undertake engineering or statistical studies to establish the allocation of costs between 30-foot and taller poles.

39. In California, the 40" safety zone is preempted and a 72" safety zone is required. *See infra*. As a result, only one cable attachment can be made to 30' poles in California.

Utilities classify the costs of such poles into different sub-accounts, and the information is sufficiently available in this segregated fashion to permit this subclassification. Most of the Electric Utilities classify all drop and service poles to account 364, except for light poles which are in account 373.

1. Assumptions Related to Thirty Foot and Shorter Poles

As is readily apparent from the photographs in the Exhibit, the typical use of such shorter poles is for the carriage low voltage power service drop lines and communications service drop lines. As is also apparent in the photograph, it is possible for two communications attachers to place themselves on thirty-foot poles, and indeed this takes place in the field. Even though many of these poles only have two attachments, for purposes of creating a presumptively applicable formula, we will assume that the number of attaching entities will typically be three -- power, telephone and cable.

The amount of usable space allocated to each party is greatly influenced by the height and use of the pole. On thirty foot poles, the electric utility typically takes only twelve inches (12") due to the fact that only a low voltage secondary line is attached to the pole.

The allocation of space on a thirty foot pole is as follows:

six inches	unusable space at the top of the pole
one foot	power space
forty inches	safety space (discussed below)
one foot	cable television space
one foot	telephone space
18.2 feet	ground separation requirement
five feet	pole below the ground

As is apparent, the total usable space, not including the forty inch safety clearance (which will be discussed below), is three feet. This usable space should be allocated, for

purposes of all thirty foot drop poles, one third each to the electric utility, the cable company and the telephone company. We note that in a number of service territories, the electric utility and the telephone company may have their own poles or other separate methods of distributing lines. Because of variations among service territories the assumptions applicable to each utility should be left open on a case by case basis, depending upon the historical experience of the number of attachers to the poles.

2. Pole Allocation Assumptions for Poles Over Thirty Feet

Poles thirty five feet and higher are typically used as mainline poles. As a consequence, the electric utility uses the poles for the distribution of primary voltage electric service. In these applications typical pole height is forty feet, and the electric utility is usually assigned seven and one-half feet for the attachment of its power lines and associated equipment. This power space allocation consists of space for the energized conductors attached to the poles and the code-required space between each energized conductor and the neutral conductor -- only half a foot of space is required to meet the code requirements between electrical conductors.⁴⁰ Once again reserving the issue of the forty inch safety margin for discussion below, the remainder of the usable space on the pole is typically four feet. Of this space, the cable company takes one foot, and the telephone and communications providers are assigned the other three feet of space. Taller poles are generally required in order to accommodate more attachers. Indeed, as a result of the need to accommodate more and more separate attaching entities and still have space for future

40. This code requirement is different from the forty inches of safety space alluded to above and discussed in detail below.

electric expansion, poles have been getting taller and of a stronger class -- and hence more expensive over time.⁴¹ Leaving the issue of safety spaces aside for the time being, the allocation of space on a forty foot pole is as follows:

seven and one half feet	power space
forty inches	safety (discussed below)
one foot	cable television space
three feet	telephone space
19.2 feet	ground separation requirement
six feet	pole below the ground

Electric utilities have retained the presumption that 18 feet of ground clearance is adequate for 30 foot poles. However, for the larger, 40 foot pole, 19 feet is a more accurate estimate given the heavier loadings on these primary distribution poles, the typically wider spacing between poles, and the need to install the lowest wire well above 18 feet to meet minimum ground clearances and account for sag.

B. Other Usable Space Matters -- Forty Inch Safety Margin

1. The 40-Inch Safety Space

Under the Commission's original implementation of Section 224, the cost of the 40 inches of pole space required for safety between electrical wires and attachers' facilities⁴²

41. As the number of lines on a pole increases due to attachment by CATV and telecommunications companies, particularly to the extent that such attachments employ steel messengers, the loading on poles increases and the strength necessary for the pole to safely accommodate the attachments increases proportionately. The result is a move toward more expensive poles. This situation is exacerbated where attachers use line-of-sight construction and tight-as-a-fiddle wiring that further increases the stress on the poles.

42. It should be noted from the outset that, as suggested *supra*, flexibility should be given to modify the formula, even as to the 40-inch safety space. In some states, greater amounts of safety space are required by local rules. For example, in California, PG&E's service territory, the 40-inch safety space requirement is preempted by General Order 95, Section IX, Rule 92.1-A, which requires 72 inches of safety space.

was assigned to useable space. As a result, its costs fall primarily upon the electric utility, since cable operators only pay 1/13.5th, or seven percent, of the cost of useable space times the cost of the entire pole. The Electric Utilities believe that the time has come to correct this inequitable allocation of the 40 inch safety space --particularly given that it has never had sound factual or theoretical support. The costs of maintaining the 40-inch safety space should fall to its sole beneficiaries -- the attaching entities. The Electric Utilities believe that this is the only factually and legally supportable way to allocate the cost of this space.

The Commission based its original imposition of the costs of the 40-inch safety space on assumptions which were not well-reasoned at the time. We suspect that this was in furtherance of a policy of giving the benefit of every doubt toward supporting the then-fledgling cable industry. In spite of this, it is abundantly clear that none of the 40 inch safety zone should be assigned as usable space to the electric utilities. It should properly be assigned to cable and telecommunications attachments as usable space. If it is not assigned as useable space allocated to the cable and telecommunications providers, then, at a bare minimum, it should be removed from useable space and assigned to unusable space. Under no circumstances should it be included in useable space for which the electric utility must pay.

The original Pole Attachment Act, and the Commission's regulations implementing it, arose in the context of a newly emerging cable industry ostensibly in need of substantial nurturing. The pole attachment statute and formula were designed to favor the cable industry so as to spur the growth thereof. As the Senate recognized:

The formula, developed in 1978, gives cable companies a more favorable rate for attachment than other telecommunications service providers. The beneficial rate to

cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy.⁴³

In short, the Commission gave every benefit to the cable industry in its original rules.⁴⁴

As noted at the beginning of these comments, the nation's cable companies are no longer fledgling, start-up enterprises. They have combined into several conglomerate companies, which are substantially larger, in terms of revenue and customers served, than even the larger of the electric utilities. Cable industry players such as TCI and Cox are sophisticated and powerful players no longer in need of substantial subsidies paid by the electric utilities and their customers.⁴⁵ The Commission no longer needs to "nurture" cable company attachers by requiring electric utilities to provide subsidies by way of their paying for a 40-inch safety space necessitated solely by the presence of cable and telecommunications attachments.

The 40 inches of safety space exists **solely** for the benefit of, and in order to facilitate, the cable and telecommunications attachments. As a well-recognized authoritative manual on the code states:

43. S. Rep. No. 104-23, at 91 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 58.

44. *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Memorandum Opinion and Second Report and Order, 72 FCC.2d 59, 74 (1979). ("The underlying concept is that rates should be set to avoid inhibiting the growth of cable television and to insure that cable operators and their subscribers make *some* [marginally] equitable contribution to the fixed costs of the utility systems they use.").

45. The Commission's pole attachment complaint procedures, 47 C.F.R. 1.1401 et seq., have provided cable companies a meaningful forum in which they may have their pole attachment complaints resolved, and many, if not all, cable companies have the wherewithal and representation to pursue such remedies. This translates not only into the ability of cable companies to defend themselves from unscrupulous pole owners, it also provides bargaining strength that more often than not renders resort to such a remedy unnecessary in the first instance.

For their safety, it is intended that communications workers will not work on communication conductors, cables, or brackets located less than 1 m (40 in) below supply conductors, cables or brackets.⁴⁶

The Commission itself has acknowledged that the safety space exists primarily to protect the interests of the attachers, particularly their workers and their facilities.⁴⁷ The costs of the 40-inch safety space should be assessed to those for whose benefit it was established -- the attaching entities. If there were no attaching entities the electric utility would install its conductor to achieve minimum mid-span ground clearance, nominally 18 feet, and there would be no need to add the additional 40 inches to the pole in order for the electric utility to comply with all safety requirements legally applicable to it.

Experience has also led the electric utilities to examine the issue of safety space and how it works in practice, lending a new perspective that had not been developed at the time that the FCC's regulations were originally adopted. The NESC requires forty inches of safety space *at the pole*.⁴⁸ The Code also requires the continuous maintenance of a thirty inch (30") safety space mid-span,⁴⁹ for the same reason -- protection of non-electrical

46. NATIONAL ELECTRIC SAFETY CODE HANDBOOK 309 (Allen L. Clapp, P.E., R.L.S., ed., 4th ed., 1996) ("NESC Handbook") (emphasis added).

47. *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Memorandum Opinion and Second Report and Order, 72 FCC.2d 59, 70 (1979). ("The safety space is intended to minimize the likelihood of physical contact between *employees working on CATV or telephone* cables and the potentially lethal voltage carried by electric lines, as well as to prevent electrical contact between such cables.") (emphasis added).

48. NATIONAL ELECTRIC SAFETY CODE § 238 (IEEE 1997) ("NESC").

49. NESC at 235C2b(1).

workers.⁵⁰ Maintenance of the thirty-inch margin, however, often requires allocation of much more than just forty inches of space on the pole due to differences in sag.⁵¹ These differences in stringing and sag conventions often require the electric utility to move its lines higher on the pole, or move the other attachers down, in order to maintain the proper mid-span clearance. This can result in more than a 40-inch safety clearance zone on the pole itself. Once again, however, this clearance is for the benefit of the communications workers, not the general public or the electric utility.

The Commission should recognize that the 40 inches of safety space would not exist were it not for attaching cable and telecommunications entities. The fact is that the 40-inch safety zone is not needed by the Electric Utilities. Their workers are qualified to work near and around high voltages. The extra space exists solely to accommodate the third party attachers. The 40-inch buffer is necessary to protect the health and safety of the third party

50. NESC Handbook at 296.

51. Sag is the amount of loss in mid-span ground clearance caused by the effect of gravity on lines. As is demonstrated in the photographs attached hereto at Exhibit 2, communications companies typically string their lines very tightly, often close to line-of-sight. Electric companies tend to not string their lines so tight, for a number of reasons. Electric lines generate heat that causes the lines to stretch slightly. They also expand and contract in response to ambient temperature.

Most importantly, electric utilities take extra precautions to ensure proper sag in their lines. Sag construction, done properly, is less likely to allow lines and cables to pull utility poles out of correct alignment. Tighter construction with less sag is more likely to cause the pole to tilt, which can compromise its integrity. In extreme cases, undue tension can cause the lines to snap, resulting in power outages and threat to life and property arising from live lines reaching or approaching the ground.

Finally, if electric lines sag and telecommunications lines do not sag in parallel, sufficient clearances are not satisfied at midspan. This can result in electric and communications lines coming into contact at midspan, causing a variety of service, reliability and other problems.

attachers' installation and maintenance of attachments, and for the safety of their workers. The presence of cable and telecommunication attachments are solely responsible for the Electric Utilities' building the extra 40 inches into their distribution system design. The costs of the safety space should be borne by those for whose benefit it exists -- the attaching entities. In any event, the Electric Utilities do not believe that this space should be allocated as usable to them and submit that there is no basis in law or fact for doing so.

Although the Commission has previously considered this issue,⁵² the Commission improperly concluded that the 40-inch safety space benefitted electric utilities. Too much reliance was placed on, *inter alia*, the assumption used in an example in the Senate Report to the original version of § 224. The example used in the Senate Report assumed that cable occupied only one foot of useable space. The Commission inferred from this that Congress had constrained the Commission and intended for it to allocate only one foot of useable space to cable companies. There is, however, no indication whatsoever that the Senate Committee was at the time even cognizant of the 40 inches of safety clearance required. The Electric Utilities submit that the Commission in 1978 placed too much reliance upon this one isolated statement in the legislative history at the expense of glossing over the facts and the legal requirement to allow utilities to recover, at a minimum, their true incremental costs. The 40 inch safety space is clearly such a cost.

52. *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Memorandum Opinion and Second Report and Order, 72 FCC.2d 59, 70-71 (1979); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Memorandum Opinion and Order, 77 FCC.2d 187, 188-91 (1980).

In the twenty years since this issue was previously considered, the balance has clearly shifted so that there is no reason to preclude utilities from recovering their true costs by imposing a presumption about the amount of pole space used by cable operators. Instead, the subsidy that has been provided the cable industry under the one foot rule should be brought to an end. Senator Murkowski has commented on the issue of cross-subsidization, as follows:

I am deeply concerned that these provisions would have a significantly adverse impact on electric utility ratepayers throughout the Nation. I am particularly concerned that these provisions would require electric ratepayers to shoulder the burden of subsidizing not only cable operators but also telephone companies and telecommunications providers. * * * * Put simply, it is not fair to ask consumers of electricity to subsidize cable operators and telephone companies.⁵³

Based on the indisputable facts, and under any reasonable reading of the statute, the 40 inch safety zone should be assigned to cable and telecommunication attachers.

One further point requires comment. In past proceedings the communications attachers have argued that the forty-inch space is actually used by the electric utilities but is non-usable to the attachers and should therefore be allocated to the electric utilities. This argument lacks merit.

The NESC severely limits the uses to which the forty inch space can be put. While electric utilities sometimes place streetlights in the forty inch space, this is not related to the usability of the space, but to luminary requirements of local jurisdictions and the NESC. As pole heights increase, the level at which street lights will be attached will continue to move down the pole -- well into or below used communications space. Lighting brackets attached

53. See 141 Cong. Rec. S8460-01, S8467.

at various places on poles determined by the lighting coverage area, and not the "usable" space available on the pole. Further, and more critically, utilities are strictly limited in the use they can make of the space for high-voltage conductors. Since their own workers are qualified to work near high voltages, they do not need the protection of the forty inches for street lights or any other incidental use they may make of the forty-inch space.

Moreover, electric utilities are not the only attaching parties to make incidental use of spaces on the poles which is not directly assigned to them. Cable and communications companies use substantial amounts of pole space for their own service related attachments. In the photographs supplied, at Exhibit 3, one can see that the communications companies use both the forty-inch space, and the ground clearance space, for the attachment of power supplies (required for carrying the signals over long distances), repeaters and amplifiers, supporting guy attachments and splitter boxes. More importantly, all attachers are increasingly using the entire pole for two additional uses. In many communities the communications companies are now, either to comply with local zoning requirements or for individual business reasons, running the drop attachment down the pole and burying it underground to the facility being served. Examples of this treatment are provided at Exhibit 4 attached hereto. In addition, many communications companies use nitrogen and other inert gases to pressurize their cable lines.⁵⁴ In instances such as these, the cable and

54. Pressurization helps prevent the seepage of moisture into the lines, causing interference, shorting and reduced communications quality, and helps in line rupture or leak protection. In instances where a line has ruptured or is obtaining moisture, a quick check of the line pressure valve, or the use of a ground based gas detection unit, communications personnel can detect immediately the source of the leak or other line trouble. These systems are typically not used by electric utilities. In fact, many primary and secondary lines are not
(continued...)

communications companies are making substantial use of the ground clearance section of the pole. For the same reason that the cable and communications companies would assert that attachments such as pressurization tanks and lines, amplifiers, power supplies, repeaters and splitter boxes represent only "casual" use of pole space, the electric utilities submit that the use of any pole space for the occasional transformer or streetlight would likewise not constitute "use."

Based upon the clear reasoning behind the existence of the safety space, the electric utilities believe that it is uncontroverted that the forty inch space is "used" by, and exists solely for the benefit of, the communications attachers, and must as a matter of law be allocated thereto as usable space. At the very least, the practice of allocating this safety space as useable should be abandoned, and it should be classified as unusable.

2. Result of Recommendations

The Electric Utilities submit that the current formula, which is based on a 37.5 foot pole, with 13.5 feet of useable space, of which 7.5 is assigned to electric utilities, 3 feet to telecommunications providers and 1 foot to cable providers, is no longer supported by the facts and can no longer be justified under Section 224(d). Among its major legal defects, the formula fails to fully allocate pole costs based on assigned useable space. This defect results from the fact that only 11.5/13.5, or 85 percent, of the

54. (...continued)
even insulated as insulation provides little function for electric distribution lines.

The nitrogen and other gas pressurization tanks are placed at the foot of the pole, and typically strapped thereto. The pressurization lines are run up the pole to be plugged into the communications cable.

total useable space gets assigned. By default, the electric utility is forced to absorb the unassigned 2/13.5, or 15 percent, of pole costs. The Electric Utilities submit that this violates the intent of § 224(d) and the Commission's stated objective of allowing recovery of fully allocated costs. The recommendations made herein by the Electric Utilities correct the above deficiency in the current formula by allocating 100 percent of useable space. The recommendations also reflect current data relative to size and use of poles.

Another major correction proposed by Electric Utilities is to recognize the fundamental differences between 30-foot poles and poles greater than 30 feet. Thirty-foot poles represent a sufficient portion of the total pole population to cause the costs of larger poles to be understated. More significantly, the useable space on 30-foot poles is totally different from that on poles larger than 30 feet. As shown in the preceding section, only 12 inches of space is utilized by electric utilities on 30 foot poles. This materially affects the allocations.

A final major correction recommended by Electric Utilities is to properly allocate the 40 inches of safety space⁵⁵ to cable and telecommunications attachments based on the indisputable fact that this space exists solely to permit these attachments. It is useable to cable and telecommunications services entities because it permits the cable and telecommunications providers to maintain and service their lines. It is of absolutely no value to the electric utilities. This allocation of safety space is also consistent with the fact that the

55. It should be recognized that some jurisdictions have more restrictive safety space restrictions and that 30 foot poles may not accommodate more than one attachment. *See infra*, note 27. In such jurisdictions, only one third party attachment would be presumed in the calculation.

7.5 feet of space assigned to electric utilities already includes the NESC-required clearances between electric conductors. Accordingly, each user pays for the NESC safety zone required to support its use of the pole under our proposal.

Combining these three corrections, and equally sharing the 40 inch safety space with an assumed cable attachment and a telecommunications attachment for each 30 foot pole (which is conservative since not all 30 foot poles contain two attaching entities), results in the following allocation of useable space:

- Useable space is 76 inches (40 inches plus 1 foot each for cable and telephone and 1 foot for the electric)
- The allocation to cable is 32/76, or 42 percent
- The allocation to telephone is 32/76, or 42 percent
- The allocation to the electric supplier is 12/76, or 16 percent.

For purposes of establishing a preemptively applicable formula the Electric Utilities have assumed only one other class of pole, a 40-foot pole, although available data shows that with the removal of 30 foot poles from the calculation the average pole size for many of the Electric Utilities is greater than 40 feet. For 40-foot poles, the Electric Utilities accept the Commission's traditional allocation of occupied space for cable, telecommunications and electric service (12 inches for cable, 36 inches for telephone, and 90 inches for electric service). As with the 30-foot poles, the 40 inches of useable space is required by cable and telecommunications providers to protect their workers and to permit compliance with the NESC.⁵⁶ The Electric Utilities also propose that an assumption be made that each pole

56. NESC Handbook at 309.

supports one cable, one telephone and one electric service provider. Similarly, and for the same reasons, we assign the 40 inches of safety space equally to the cable and telecommunications service providers. This results in the following allocation of usable space:

- Useable space is 178 inches (40 inches plus 32 inches for cable, 56 inches for telephone and 90 inches for the electric.
- The allocation to cable is $32/178$, or 18 percent.
- The allocation to telephone is $56/178$, or 31 percent.
- The allocation to the electric supplier is $90/178$, or 51 percent.

For both 30-foot poles and 40-foot poles, to establish the maximum presumptively applicable annual rental rate, these above-derived factors are applied to the average pole cost (as adjusted by the carrying charge rate), which is the subject of the next section.

V. POLE ATTACHMENTS

The Electric Utilities should recover all costs caused by the presence of the third party attachment. These can be recovered either via the annual rent, as a make ready cost, or as an annual or monthly cost which is directly assigned. Because accounting practices vary from utility to utility, considerable discretion should be allowed in the manner in which these costs are calculated and collected, so long as there is reasonable evidence to support calculations, allocations and methods selected for collecting legitimate costs.